



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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AUG 29 1973

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Particle Data, Inc.  
P.O. Box 265  
Elmhurst, Illinois 60126

Attention: Mr. Robert H. Berg  
President

Gentlemen:

Further reference is made to your letter of April 17, 1973, with enclosures, and subsequent correspondence, protesting against the award of a contract to any other firm under invitation for bids (IFB) No. WA-72-E217, issued by the Environmental Protection Agency (EPA).

The EPA, on May 9, 1972, issued IFB No. WA-72-E324 for 12 items of "Coulter" counter equipment on a "brand name or equal" basis. The equipment was to be delivered to three EPA field laboratories. Four bids were received in response to this IFB, the Coulter Electronics, Inc. (CEI), bid being low.

Upon bid opening, your firm (FDI) submitted a protest to the Equipment, Services and Construction Procurement Section, Contracts Management Division, EPA. The basis for the protest was that the design of the equipment proposed by CEI for items 10-14 was obsolete, that there were no salient characteristics for items 7, 10, 14, and 19, and that the IFB was essentially defective in that pertinent salient characteristics were completely missing.

As a result of this protest, the IFB specifications were reviewed and amendment No. 3 was issued on September 15, 1972, canceling IFB No. WA-72-E324 in its entirety.

On December 7, 1972, IFB No. WA-72-E217 was issued for four items of "Coulter" counter equipment on a "brand name or equal" basis. The instant IFB included revised and more extensive salient characteristics than those included in the canceled IFB. The solicitation covered items 9 through 12 of the canceled IFB, which were being procured for EPA, National Environmental Research Center, Corvallis, Oregon.

FDI, by letter dated December 29, 1972, submitted a formal protest to the IFB specifications. Amendments 1 and 2 were issued to extend the

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bid opening pending resolution of the PDI protest. Amendment No. 3 was issued on February 7, 1973, to clarify and correct the descriptions and salient characteristics with an extension of the opening date to February 28, 1973. The contracting officer, on the same day, February 7, 1973, responded to the PDI protest by advising your firm that it was his determination that the specifications were not unduly restrictive, but served to describe the Government's minimum needs.

On the amended bid opening date the following four bids were received:

PDI	\$34,010
CEI	37,195
CEI alternate	26,795
Scientific Products	37,195

As part of its bid, PDI protested any basis of award which failed to consider its monitoring system as being fully equal or superior to the IFB specifications. There followed your protest to our Office. CEI has also protested rejection of its bid for failure to acknowledge amendment No. 3 to the IFB, which has not ruled on same pending our decision in this matter.

The contracting officer believed that no responsive bids were received because CEI and Scientific Products failed to acknowledge certain amendments and because PDI qualified the "Guaranty" provision. PDI, on the other hand, claims that its bid did not contain a qualified guaranty provision.

The IFB contained a guaranty provision as follows:

"GUARANTY: Notwithstanding the provisions of the 'Inspection' clause of this contract, the Contractor guaranteed that at the time of delivery thereof the articles provided for under this contract will be free from any defects in material or workmanship and will conform to the requirements of this contract. Notice of any such defect or nonconformance shall be given by the Government to the Contractor within 1 year of the delivery of the defective or nonconforming article. If required by the Government within a reasonable time after such notice, the Contractor shall with all possible speed correct or replace the defective or nonconforming article or part thereof. When such correction or replacement requires transportation of the article or part thereof, shipping costs, not exceeding usual charges, from the delivery point to the Contractor's plant and return, shall be borne by the Contractor; the Government shall bear all other shipping costs. This guaranty shall then continue as to corrected or replacing articles or, if only parts

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of such articles are corrected or replaced, to such corrected or replacing parts, until 1 year after date of redelivery. If the Government does not require correction or replacement of a defective or nonconforming article, the contractor, if required by the Contracting Officer within a reasonable time after the notice of defect of nonconformance, shall repay such portion of the contract price of the article as is equitable in the circumstances."

PDI's bid, however, not only restated this provision, but added the following phrase:

"TELETYPE GUARANTEE REQUIRES THAT THE TELETYPE UNIT BE PLACED UNDER A ROUTINE PREVENTIVE MAINTENANCE PROGRAM EQUIVALENT TO THAT OFFERED BY THE TELETYPE CORP. (TELEPHONE AND/OR TELEGRAPH COMPANIES GENERALLY OFFER SUCH CONTRACTS AS WELL, SHOULD THERE BE NO IN-HOUSE CAPABILITY FOR SUCH ROUTINE PREVENTIVE MAINTENANCE.) NO SUCH QUALIFICATION IS REQUIRED FOR THE BALANCE OF THE EQUIPMENT SYSTEM BID --- STRAIGHT ONE-YEAR WARRANTY AS ABOVE APPLIES."

It is this additional language that the contracting officer claims makes the guaranty provision qualified in that PDI added a preventive maintenance requirement not imposed upon the Government by the IFB.

One of the basic principles of competitive bidding for public contracts is that a contract may be awarded only on a bid which is responsive to the terms of the invitation. Our Office has recognized that the terms of a warranty are a material part of bid specifications and that a qualification of warranty terms in a bid will require rejection of such a bid as nonresponsive. 45 Comp. Gen. 273 (1965); B-169927(1), March 16, 1971. In the present case, the IFB guaranty clause was changed in your bid by imposing on the Government a duty not contemplated by the IFB making coverage on the teletype unit subject to the institution of a routine preventive maintenance program equivalent to that offered by the teletype corporation.

Since your company included in its bid a material exception to the terms and conditions of the solicitation, we must concur in the administrative view that the bid was nonresponsive. Based upon this fact, we find it unnecessary to discuss your other contentions. We therefore conclude that your bid was properly rejected and may not be considered for award.

Sincerely yours,

Paul G. Dembling

For the

Comptroller General  
of the United States

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